IN THE SUPREME COURT STATE OF FLORIDA

CASE No. SC06-2227

JOHN S. HUSAK,

Petitioner,

v.

DOREEN SIEGEL, A.R.N.P., and ACE AMERICAN INSURANCE COMPANY,

Respondents.

AMENDED BRIEF ON JURISDICTION OF DOREEN SIEGEL and ACE AMERICAN INSURANCE COMPANY

ON DISCRETIONARY REVIEW FROM A DECISION OF THE THIRD DISTRICT COURT OF APPEAL

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INTRODUCTION

The district court was asked whether or not Nurse Siegel, "who was working under the direct supervision of [Dr.] Feldman, was separately negligent for the misdiagnosis" of Husak's injuries. *Siegel v. Husak*, 2006 WL 3019595 at *1 (Fla. 3d DCA Oct. 25, 2006). Applying the statutes which govern the practice, duties, and responsibilities of Advanced Registered Nurse Practitioners (ARNPs), the court held she was not. Husak's jurisdictional brief never mentions these statutes, and addresses one of his arguments to a one-judge concurring opinion.

Because Husak's brief omits key facts on which the district court relied and impermissibly includes snippets of trial testimony, ¹ Respondents submit a substitute Statement of the Case and Facts.

STATEMENT OF THE CASE AND FACTS

Siegel was a Florida licensed ARNP working in the medical office of Dr. Feldman under a protocol – authorized by the Nurse Practice Act (Chapter 464, Florida Statutes (2003)) – for the performance of her services under his supervision and direction. *Siegel* at *1 and *3.

The statutory provisions which govern the Feldman-Siegel protocol allow ARNPs to diagnose patients "within the framework of an established protocol," and direct that the supervising physician "shall maintain supervision" over an ARNP. § 464.012(3), Fla. Stat. (2003). The protocol governing Siegel obligated

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¹ The Court denied Respondents' motion to strike Husak's jurisdictional brief for a violation of the "four corners" doctrine. Respondents assume that in passing on express and direct conflict, the Court will disregard references to trial testimony.

Feldman "to promptly review the chart or file of each patient seen by Siegel and to initial his concurrence or disagreement with Siegel's work." *Siegel* at *3. The district court held:

It is neither disputed in this case that Feldman had the ultimate responsibility for the diagnosis and treatment of Husak, nor that Feldman negligently diagnosed Husak's medical condition.

Id. at *1.

The district court then applied the undisputed facts to Feldman's undisputed statutory responsibility to direct the entry of a verdict for Siegel because

Siegel was working under the direct supervision of Feldman, and because she did not commit any deed or act of negligence separate from that for which Feldman had the ultimate responsibility

Id. The court found "no evidence in the record that Siegel violated a Florida standard of care for ARNPs at the time she made her 'nursing diagnosis," and in fact found that "the evidence is to the contrary." *Id.* at *3, emphasis added. The court held that Siegel

placed on Husak's chart and in his file all of the information from which her supervisor, Dr. Feldman, could have made the correct diagnosis or referral had he been attentive.

Id. Because Siegel "gave her superior and supervisor all information necessary for him to make the correct judgment," there was "no evidence of independent negligence by Siegel apart from that for which Feldman was responsible." *Id.* at *4.²

These are the facts from the district court's decision which will govern the Court's exercise of discretionary review authority.

Additionally, the district court determined from the record that the trial court impermissibly permitted Husak's expert witness to offer a "legal opinion based upon Florida statutes" (which the court found contrary to Florida law), in violation of the principle that experts are not "competent to contradict the law of this state." *Id.* at *5. The court further held that it "need not reach" Husak's argument concerning the applicability of a national standard of care which his expert equated with the Florida standard, but if "required to do so" would find that Husak failed to offer sufficient evidence that Siegel violated even a national standard. *Id.*

In a concurring opinion, one judge on the panel expressed his view that the so-called "locality" rule which applies to physicians in Florida should apply to ARNPs, but that Husak's expert "inaccurately equated a national standard to Florida's locality rule." *Id.* at *6. (This is the third issue argued in Husak's brief.)

SUMMARY OF ARGUMENT

The district court correctly held that an ARNP operating under the supervision of a physician who is obligated by a statutorily-authorized protocol to review the charts and files of her patients, but fails to do so, cannot be independently liable for the physician's negligence. The court's decision is squarely grounded on the statutory scheme governing ARNPs which had been created by the Florida Legislature and the Feldman-Siegel protocol. Husak nowhere addresses the statutes, misstates the facts, improperly asserts conflict with an issue mentioned only in the concurring opinion of one judge, and ignores an alternate ground for the district court's decision which makes any review by the Court a fruitless exercise.

Sections 458.348, 464.003(3)(c) and 464.012(3) of the Florida Statutes, in

combination with the Feld man-Siegel protocol, made Feldman *solely* responsible for any negligent misdiagnosis of Husak's exercising injuries. Husak identifies no Florida case which has applied those statutory provisions, let alone one that conflicts with the district court's construction of those statutes. Husak's attempt to suggest decisional conflict first falters from his failure to acknowledge the district court's reliance on the statutory scheme for ARNPs, or to cite to any appellate decision in Florida which suggests that an ARNP being supervised under a statuto-rily-authorized protocol is liable for a failure of the supervising physician to fulfill his protocol responsibilities.

Husak's claim of decisional conflict additionally falters on the factual foundation for the district court's decision. He does not deny the existence, validity, or content of the Feldman-Siegel protocol; does not suggest that the statutes and the protocol are not controlling in this case; and does not challenge the district court's application of the ARNP statutory scheme to the Feldman-Siegel relationship. Husak relies on Florida appellate court decisions which do not involve an ARNP or this statutory scheme, and which employ common law principles in vastly dissimilar factual settings to nursing homes, physicians, and non-ARNP nurses.

Husak's attempt to obtain Court review is also undone by his failure to mention, let alone address, the district court's alternative holding that the opinion of his sole expert was an impermissible "legal" opinion, and contrary to Florida law on the subject, and that "opinion testimony as to the legal interpretation of Florida law is not a proper subject expert testimony." *Id.* at *5, quoting *Estate of Williams v. Condon*, 771 So. 2d 7, 8 (Fla. 2d DCA 2000).

ARGUMENT

I. The district court's decision does not conflict with decisions which allow negligence claims against nursing homes, physicians and non-ARNP nurses.

Husak has lumped several unrelated arguments into the first Argument section of his brief. Each is addressed here separately.

(1) Husak asserts that the court "misconstrues" the phrase "independent negligence" in *Drew v. Knowles*, 511 So. 2d 393 (Fla. 2d DCA 1987), and ignored other language in that opinion. Husak brief at 6. The court did neither.

Drew did not involve an ARNP acting under a statutory protocol which assigned ultimate responsibility to a physician by mandating a prompt review of diagnoses on patients' charts, and confirmation of that review by his initials on the charts. *Drew*, which merely reversed the dismissal of a complaint against four non-ARNP nurses, noted that a nurse acting under the direction of a physician "is absolved from liability for the acts so performed, absent independent negligence.

511 So. 2d at 396. The court nowhere indicated whether the nurses were acting under the direction of a physician, or what "independent" negligence was alleged.

In this case, the district court accurately quoted the *Drew* decision (*Siegel* at *4), but determined from the record that Siegel had not committed any independent act of negligence. Husak ignores that finding. The court's decision in no way misconstrues the *Drew* decision.

(2) Husak next asserts conflict based on the district court's determination that ARNPs are governed by standards which differ from those governing other members of the medical profession. Husak brief at 7. He grounds this argument

on a claim that the standards are the same, and he bases that contention on *Integrated Health Care Serv.*, *Inc. v. Lang-Redway*, 840 So. 2d 974 (Fla. 2002). *Integrated* does not support his claim, though, and in fact *supports* the district court's decision that the standard of care for ARNPs is different from the common law standard of care for medical malpractice which is applied to other health care providers.

Integrated was a suit against two nursing homes for violations of the Nursing Home Act, Chapter 400 of the Florida Statutes. The issue was the applicability in that circumstance of the presuit notice requirement found in Chapter 766, Florida Statutes, the Medical Malpractice statute. The Court held that the standard of care (and the presuit notice requirement) in the Medical Malpractice statue was *not* applicable in suits against nursing homes, because the Nursing Home Act "provides its own standard of care." 840 So. 2d at 980. Thus, although the Court noted that Chapter 766 was applicable to "nurses" (as Husak argues), the Court made clear that Chapter 766 has no applicability to a claim brought against a nursing home under Chapter 400. For precisely the same reason, the definitions and provisions in Chapter 766 on which Husak relies have no applicability to a claim brought against an ARNP governed by the Nurse Practice Act, Chapter 464, Florida Statutes.

The district court held that "there are three types of nursing licensure recognized by the laws of this state" (*Siegel* at *1), one of which uniquely governs ARNPs working directly under a statutorily-authorized protocol with a supervising physician. The court interpreted the applicable statute to mean that in those circumstances, only the supervising physician has ultimate responsibility for a medi-

cal diagnosis he has agreed to review promptly and either approve or disapprove.³ Just as the Court in *Integrated* held that the Nursing Home Act had its own standard of care, the district court here held that Nurse Practice Act provides its own standard of care.

(3) Husak next asserts that the district court's treatment of the standard of care as an issue of law, rather than as an issue of fact, conflicts with *Torres v*. *Sullivan*, 903 So. 2d 1064 (Fla. 2d DCA 2005). Husak brief at 7-8. This argument is based on Husak's misreading of the district court's decision and an unwarranted reading of *Torres*.

Applying the textbook rule that summary judgment cannot be entered by "assessing the weight or credibility" of testimony, *Torres* merely held that a summary judgment cannot be entered for a physician by rejecting testimony from the plaintiff's expert as to what standard of care is required of a physician. 903 So. 2d at 1065, 1067. Explaining that the defendants were confusing "whether a duty is owed" with "what standard of care is required to satisfy that duty" (*id.*, emphasis added), the court held that the latter is a question of fact. *Id.*

The district court held that Siegel had no independent duty under the Nurse Practice Act, which formed the legal predicate for the Feldman-Siegel protocol and

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Husak's expert, Nurse Barragan from California, opined contrary to the district court that Siegel "owed an independent legal duty to Husak." *Siegel* at *5. Just like any other expert witness, however, she was not competent to offer a legal opinion interpreting a Florida statute. *Id.*, citing to *Estate of Williams, supra*, and *Florida Power & Light Co. v. Lively*, 465 So. 2d 1270, 1272 (Fla. 3d DCA), *review denied*, 476 So. 2d 674 (Fla. 1985).

governed their relationship. The court properly held that it was a matter of law to apply to that Act the undisputed fact that Siegel had placed on Husak's chart "all of the information from which [Dr. Feldman] could have made the correct diagnosis or referral had he been attentive." *Siegel* at *3. The decision of the district court in this case rests on the purely *legal* issue of whether the ARNP statutes and implementing protocol can be a basis to hold Siegel independently liable for duties as to which Feldman assumed full and final responsibility. The district court's interpretation of the Nurse Practice Act does not conflict with anything in *Torres*.

(4) Husak next argues that the district court's decision conflicts with cases which hold that Florida has abandoned the so-called "locality rule" with respect to expert witness testimony in medical malpractice cases. Husak brief at 8-9. This argument cannot be entertained by the Court, however, as only one member of the panel expressed a view that the locality rule is still valid law in Florida, in a concurring opinion. *Siegel* at *6. Conflict jurisdiction cannot be based on a concurring opinion. *Cf., Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980).

In any event, the panel majority did not say the locality rule applied, and in fact accepted the opinion of Husak's expert that a national standard of care was applicable. *Siegel* at *5. The panel majority concluded, however, that Husak's expert was interpreting the Florida statutes when she opined that Siegel had an independent duty, in contradiction to the court's interpretation that "there is no

⁴ Husak cites to *Sweet v. Sheehan*, 932 So. 2d 365 (Fla. 2d DCA 2006); *Couch v. Hutchison*, 135 So. 2d 18 (Fla. 2d DCA 1961); *Cook v. Lichtblau*, 144 So. 2d 312 (Fla. 2d DCA 1962); *Schwab v. Tolley*, 345 So. 2d 747 (Fla. 4th DCA 1977).

statutorily established duty upon which a jury could find Siegel guilty of medical malpractice." *Id.* The determination of whether a duty exists is a question of law for the court. *E.g.*, *Florida Power & Light Co.*, *supra*.

There is neither express nor direct conflict between the panel majority's "decision" in *Siegel*, and the cases which hold that the locality rule no longer exists in Florida.

II. The district court's decision does not misapply the principles of vicarious liability.

Husak lastly contends that by holding that Siegel is exonerated for her own acts of negligence, the district court misapplied *Wilson v. Lee Memorial Hosp.*, 65 So. 2d 40 (Fla. 1953). This contention is baseless, and improperly presented from "facts" which are not before the Court for consideration.

First and foremost (and not withstanding Husak's contention to the contrary in his response to Respondents' motion to strike his jurisdictional brief), this argument is necessarily based on purported trial testimony that Siegel had independent authority to send Husak to an orthopedist after misdiagnosing his injury. Husak brief at 2. The Court is obliged to disregard that testimony. *See* note 1, *supra*.

From his faulty premise, Husak argues that Florida law exonerates a nurse only when she has received a direct "order" from a physician, and he asserts that Siegel's misdiagnosis "did not result from any order of Dr. Feldman." Husak brief at 10. A direct order from a physician was not required for Siegel, however. The ARNP statutes, together with the Feldman-Siegel protocol, operated to exonerate her from liability because she "was working under the direct supervision of Feld-

man" and he "had the ultimate responsibility" to review and sign off on her diagnoses. *Siegel* at *1. No specific order was required under these circumstances.

III. Policy reasons should also compel the Court to deny review.

Husak improvidently invokes the Court's jurisdiction. First, he fails to address the district court's alternative findings that his expert offered an impermissible legal opinion, and that the record contains no evidence on which a jury could find Siegel liable under the standard of care his expert espoused. Thus, it would be fruitless for the Court to review the district court's decision since Siegel is entitled to a directed verdict based on the absence of an evidentiary basis that she breached a standard of care.

Second, he presents no legal principle of statewide significance or contemporaneous Florida law which requires the Court's harmonization or clarification. The handful of decisions he asserts as being in conflict, mostly dating from the 1960s, 1970s, and 1980s, pose no threat to the stability of Florida's jurisprudence. Husak has simply asked the Court to act as a second-level, error-correcting tribunal, for the proverbial second bite at the apple. The Constitution makes the district courts final, however (*Jenkins*, 385 So. 2d at 1359), and there is no policy reason to give Husak a second plenary appeal.

CONCLUSION

The Court is respectfully requested to deny review of the Siegel decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this amended brief on jurisdiction was mailed on December 12, 2006 to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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ATTACHMENT





--- So.2d ------- So.2d ----, 2006 WL 3019595 (Fla.App. 3 Dist.), 31 Fla. L. Weekly D2653 (Cite as: --- So.2d ----)

Briefs and Other Related Documents

Siegel v. Husak Fla. App. 3 Dist., 2006.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

District Court of Appeal of Florida, Third District. Doreen SIEGEL, A.R.N.P. and Ace American Ins. Co., Appellants,

V.
John S. HUSAK, Appellee.
No. 3D04-2310.

Oct. 25, 2006.

Background: Patient brought medical malpractice action against doctor and licensed advanced registered nurse practitioner (ARNP), alleging decreased arm use resulting from failure of doctor and ARNP to properly diagnose ruptured tendons in patient's arms and either to timely refer him for a MRI study of his condition or to an orthopedic surgeon. The Circuit Court, Miami-Dade County, Lawrence A. Schwartz, J., entered judgment on jury verdict for patient and denied ARNP's post-trial motion for judgment notwithstanding the verdict, and ARNP appealed.

<u>Holding:</u> The District Court of Appeal, <u>Shepherd</u>, J., held that there was no "specific duty" owed by ARNP to patient which was breached by ARNP.

Reversed.

Gersten, J., filed concurring opinion.

[1] Health 198H — 172

198H Health

198HI Regulation in General
198HI(B) Professionals
198Hk162 Unauthorized Practice

198Hk172 k. Nurses. Most Cited Cases

Florida law does not permit licensed advanced

registered nurse practitioners (ARNP) to perform acts of medical diagnosis and treatment without supervision. West's F.S.A. § § 458.348(1)(a), 464.003(3)(c), 464.012(3).

[2] Health 198H 674

198H Health

198HV Malpractice, Negligence, or Breach of Duty

198HV(C) Particular Procedures

<u>198Hk674</u> k. Orthopedics; Fractures, Sprains. Most Cited Cases

There was no "specific duty" owed by licensed advanced registered nurse practitioner (ARNP) to patient which was breached by ARNP when treating patient, who alleged decreased arm use resulting from ARNP's and doctor's failure to properly diagnose ruptured tendons in patient's arms; ARNP was acting under specific direction and orders of doctor when she made her nursing diagnosis, actual responsibility for the diagnosis was with doctor, ARNP gave her superior all information necessary for him to make the correct judgment, and there was no evidence of independent negligence by ARNP apart from that for which doctor was responsible. West's F.S.A. § § 458.348(1)(a), 464.003(3)(c), 464.012(3).

[3] Health 198H 5 786

198H Health

198HV Malpractice, Negligence, or Breach of Duty

198HV(F) Persons Liable

198Hk786 k. Multiple Professionals or Health Care Workers in General. Most Cited Cases When a nurse acts under the orders of a private physician in matters involving skill and decision, she is absolved from liability for her acts.

[4] Negligence 272 — 1692

272 Negligence

272XVIII Actions

<u>272XVIII(D)</u> Questions for Jury and Directed Verdicts

<u>272k1692</u> k. Duty as Question of Fact or Law Generally. <u>Most Cited Cases</u>

Ordinarily, the question of the existence of a legal duty is one of law.

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(Cite as: --- So.2d ----)

[5] Evidence 157 506

157 Evidence

157XII Opinion Evidence

157XII(B) Subjects of Expert Testimony

157k506 k. Matters Directly in Issue. Most

Cited Cases

Health 198H 674

198H Health

198HV Malpractice, Negligence, or Breach of Duty

198HV(C) Particular Procedures

198Hk674 k. Orthopedics; Fractures,

Sprains. Most Cited Cases

Florida law did not place an "independent legal duty" on licensed advanced registered nurse practitioner (ARNP) to properly diagnose patient as having ruptured tendons in his arms, and expert, who was California nurse practitioner, was not competent to contradict the law of Florida by stating that ARNP owed an independent legal duty to patient.

Florida law did not place an "independent legal duty" on licensed advanced registered nurse practitioner (ARNP) to properly diagnose patient as having ruptured tendons in his arms, and expert, who was California nurse practitioner, was not competent to contradict the law of Florida by stating that ARNP owed an independent legal duty to patient.

Greenberg Traurig and Arthur J. England, Jr., Elliot B. Kula and Daniel M. Samson; Weinberg, Wheeler, Hudgins, Gunn & Dial and Todd R. Ehrenreich and <u>Lawrence E. Burkhalter</u>, Miami, for appellants. Deutsch & Blumberg and James C. Blecke; Charles B. Patrick, Miami, for appellee.

Before GERSTEN, SHEPHERD, and SUAREZ, JJ. SHEPHERD, J.

*1 This is an appeal by an advanced registered nurse practitioner and her insurer from an adverse jury verdict. The question presented is whether the nurse practitioner is individually responsible at law for a misdiagnosis, which was the ultimate responsibility of her supervising physician. Although there are circumstances in which a nurse practitioner can be found liable for the misdiagnosis of her supervising physician, we find there is a lack of competent substantial evidence in this case to support a verdict against the nurse practitioner and accordingly reverse

the judgment below.

INTRODUCTION

In this medical malpractice action, the defendants were Dr. Lawrence Feldman and Doreen Siegel, a advanced registered nurse Florida licensed practitioner (ARNP). The plaintiff was John S. Husak, a marketing director for Celebrity Cruise Lines.

Broadly speaking, there are three types of nursing licensure recognized by the laws of this state-licensed practical nurses, registered nurses, and ARNPs. See § § 464.003(4)-(6), Fla. Stat. (2003). ARNPs are registered nurses who have achieved further training and certification, after which they can perform additional supervised medical procedures and tasks that normally cannot be lawfully performed by other types of licensed nurses. See § 464.003(3)(e), Fla. Stat. (2003). Florida law requires these procedures and tasks be "identified and approved" under the auspices of the State Board of Nursing, see § 464.003(3)(c), Fla. Stat. (2003), or conducted pursuant to a protocol developed and agreed to by the supervising physician and the ARNP. § 458.348, Fla. Stat. (2003) (formal supervisory relationship); § 464.012. Fla. Stat. (2003)(certification of ARNPs); § 64B8-35,002, Fla. Admin. Code (2003). When operating within the context of an advanced or specialized nursing practice and supervised as required by law, "[an] advanced registered nurse practitioner may perform acts of nursing diagnosis" § 464.003(3)(c)(emphasis added). It is neither disputed in this case that Feldman had the ultimate responsibility for the diagnosis and treatment of Husak, nor that Feldman negligently diagnosed Husak's medical condition. The issue in the case is whether or not Siegel, who was working under the direct supervision of Feldman, was separately negligent for the misdiagnosis. Because Siegel was working under the direct supervision of Feldman, and because she did not commit any mis deed or act of negligence separate from that for which Feldman had the ultimate responsibility, we conclude the trial court erred in failing to direct a verdict in this case for Siegel.

FACTUAL BACKGROUND

This case arises out of a complaint filed by Husak against Feldman and Siegel. Siegel worked in Feldman's medical office under his supervision. The

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--- So.2d ---- So.2d ----, 2006 WL 3019595 (Fla.App. 3 Dist.), 31 Fla. L. Weekly D2653 (Cite as: --- So.2d ----)
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complaint alleges decreased arm use resulting from defendants' failure to properly diagnose ruptured tendons in Husak's arms and either to timely refer him for a MRI study of his condition or to an orthopedic surgeon.

*2 The record reflects that on January 10, 2001, Husak traveled to Feldman's office for treatment for injuries suffered to his arms that morning while lifting weights during his morning workout in the gym at his place of employment. Husak testified that while working out, he slipped as he pulled forward on a weight machine, felt immediate pain, and heard a "popping sound" in his arms.

Husak was first seen by Siegel, who determined, both from the receptionists' record of Husak's case history and vital signs, and from her own examination, that Husak suffered from a muscle strain or sprain. Husak's chart includes Siegel's examination notes, her nursing diagnosis, and the fact Husak reported "popping sounds" in both arms. Feldman also saw and spoke with Husak during this visit, but the record is devoid of any evidence that he actually examined Husak. Nor is there any evidence Feldman did a post-visit review of Husak's chart to indicate his professional agreement or disagreement with Siegel's nursing diagnosis, as was required by the practice and protocol that existed between them.

On Saturday, January 13, 2001, Husak called Siegel's personal number to report swelling and bruising in his arms. Siegel repeated the diagnosis and recommended course of treatment, and asked Husak to return on January 15, 2001. On that day, Siegel again examined Husak. Husak's arms were black and blue, but there was no deformity in his muscles and he had full range of motion. Siegel prescribed anti-inflammatory medication and rest, and established a follow-up appointment for January 19. Feldman saw and spoke with Husak at the January 15 visit, and this time signed Husak's chart, indicating that in his professional opinion Husak had been properly diagnosed.

On January 19, 2001, Husak visited Siegel in Feldman's office for a third time. She again examined him, noting the bruising and tenderness were improving. Feldman did not see Husak on this date, but later signed Husak's chart to reflect concurrence with Siegel's recommendations in accordance with the practice established between them. On two of these three visits, Husak received cosmetic treatments from Siegel in the form of a Botox injection and glycol peels.

Four months later, in May 2001, Husak, on his own initiative, sought a MRI study of his arms through Feldman's office. The results of the MRI, which included Husak's biceps but not his tendons, showed a condition consistent with muscle sprain. Siegel, who by then had left Feldman's employ but was covering somebody's shift as a favor, happened to be in the office on the date Husak came to retrieve the MRI results, and Siegel handed the results to Husak. According to her testimony, Siegel did not discuss the results with Husak because she did not order the MRI herself. The MRI results showed "[f]indings consistent with Type 1 Muscle Strain involving the distal biceps muscle or areas of muscle contusion."

In July 2001, Husak sought an orthopedic consultation. At this time, Husak saw Dr. Keith Hechtman, an orthopedic surgeon, who advised Husak he had torn biceps tendons. Hechtman advised Husak surgery was unnecessary because Husak's job did not require heavy labor, Husak had full range of motion, and Husak's only limitation was an inability to use weight machines.

*3 Later that same month, Dr. Raj Pandaya, an orthopedist, examined Husak. Pandaya confirmed Hechtman's diagnosis of ruptured biceps tendons and recommended surgery with orthopedic surgeon Dr. Bernard Morrey. Pandaya testified Husak would have had a greater chance at a full recovery had the surgery occurred within the first week-and-a-half of the injury.

Ultimately, Morrey performed reconstructive surgery on Husak's biceps. Although Husak did not have 100% recovery, Morrey placed no weight-lifting or other limitations on Husak subsequent to the surgery. According to his employer, Husak was able post-operatively to satisfactorily perform his employment duties. There is conflict in the record concerning the extent to which his imperfect tendons affect Husak in the performance of his daily personal tasks.

After a six-day trial, a jury awarded Husak \$1,848,068.50 medical expenses, lost earnings, and pain and suffering, apportioning fifty percent of the fault to Feldman as a *Fabre* defendant. Siegel's post-trial motions included a motion for judgment notwithstanding the verdict, new trial, remittitur, and for setoff, all of which were denied and now assigned as error on this appeal. Because we conclude that the trial court erred in not granting Siegel's motion for judgment notwithstanding the verdict, we need not consider Husak's other grounds for error.

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DISCUSSION

[1] At the outset, it is important to recognize that Florida law does not permit ARNPs to perform acts of medical diagnosis and treatment without supervision. Section 464.003(3)(c), Florida Statutes (2003), provides "[an] advanced registered nurse practitioner may perform acts of nursing diagnosis and nursing treatment of alterations of the health status." FN2 (Emphasis added). However, Florida law expressly states an ARNP may only perform such tasks pursuant to a formal protocol established between a supervisory physician and the nurse, see § 458.348(1)(a), Fla. Stat. (2003), and further that in all circumstances, the physician "shall maintain supervision for directing the specific course of medical treatment." § 464.012(3), Fla. Stat. (2003). In this case, the protocol established between Feldman and Siegel included Feldman's obligation, in his supervisory capacity (usually on the same or next day), to promptly review the chart or file of each patient seen by Siegel and to initial his concurrence or disagreement with Siegel's work. The record is devoid of any testimony that Feldman ever looked at that portion of Husak's chart reflecting his first visit. If so, Feldman would have seen Siegel's note that "popping sounds" accompanied Husak's injury. It is not disputed that a "popping sound" is a symptom of a ruptured tendon and an indicator of a need for a referral.

to the contrary. Nurse Siegel placed on Husak's chart and in his file all of the information from which her supervisor, Dr. Feldman, could have made the correct diagnosis or referral had he been attentive. For this reason, we find that this case is governed by the reasoning in *Drew v. Knowles*, 511 So.2d 393 (Fla. 2d DCA 1987). In *Drew*, the Second District held: *4 [A] nurse acting under the direction and orders of a physician in matters involving medical professional skill and judgment is absolved from liability for the acts so performed, absent independent negligence upon the part of the nurse, and absent a performance of those acts or duties a nurse is called upon to perform at a level of performance well below that which is expected of a similarly qualified nurse. Similarly, where a nurse is called upon to exercise professional judgment or to perform discretionary ministerial acts and does so negligently, the nurse may be liable.

There is no evidence in the record that Siegel violated a Florida standard of care for ARNPs at the time she

made her "nursing diagnosis." In fact, the evidence is

<u>Id.</u> (emphasis added). In <u>Drew</u>, the court worked through a twenty-four count, 230-paragraph complaint and affirmed the dismissal of a medical malpractice complaint against five registered nurses and two respiratory therapists on the ground there were no allegations of breach of "any specific duty" owed by those defendants, while at the same time reversing as to three other registered nurses and one respiratory therapist on the same ground. <u>Id.</u> at 395.

[2] Similarly, in this case, there was no "specific duty" owed by Siegel to Husak which was breached by her. Siegel was acting under the specific direction and orders of Feldman when she made her "nursing diagnosis." The actual responsibility for the diagnosis lay with Feldman. Cf. Variety Children's Hosp., Inc. v. Perkins, 382 So.2d 331, 334-35 (Fla. 3d DCA 1980) (holding that a surgeon is "captain of the ship" for acts performed under his control and direction). Although her initial impression and recommended course of treatment was flawed, Siegel gave her superior and supervisor all information necessary for him to make the correct judgment. Had she not done so-for example, had she failed to record the allegedly tell-tale "popping sounds" on Husak's chart-there would have been a triable issue of nursing negligence. There is no evidence of independent negligence by Siegel apart from that for which Feldman was responsible. Under the law of this state, only if there had been some independent act of negligence by Siegel could she then have been found liable to Husak in this case.

[3] While it may seem counter-intuitive to excuse Siegel from an incorrect diagnosis when the patient indisputably passed through her care, the nursing profession is governed by a number of standards which differ from those governing other members of the medical profession. See Louisell and Williams, Medical Malpractice, Ch. 16A "Nursing Negligence", Vol. 2 (1992). Among them is the longsettled legal principle that "[w]hen a nurse acts under the orders of a private physician in matters involving skill and decision, she is absolved from liability for her acts." Buzan v. Mercy Hosp., 203 So.2d 11, 13 (Fla. 3d DCA 1967)(quoting Rural Ed. Ass'n v. Bush, 42 Tenn.App. 34, 298 S.W.2d 761, 767 (1957)). See also Wilson v. Lee Mem'l Hosp. 65 So.2d 40 (Fla.1953); Beaches Hosp. v. Lee, 384 So.2d 234 (Fla. 1st DCA 1980).

*5 [4][5] Husak sought to circumvent this long-settled legal principle through the expert testimony of Guadalupe Barragan, a California nurse practitioner.

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However, Barragan, who had not studied the standard of care owed by Florida nurses to their patients until just before trial, FN3 and who herself never diagnosed a ruptured tendon during her twenty-five-year nursing career, was permitted by the trial court to offer the legal opinion based upon the Florida statutes that Siegel (1) owed an independent legal duty to Husak and (2) breached that duty by departing from a so-called national standard of care, which Barragan equated to a Florida standard of care. As previously demonstrated, there is no statutorily established duty upon which a jury could find Siegel guilty of medical malpractice in this case. Ordinarily, the question of the existence of a legal duty is one of law. The law of this state does not place an "independent legal duty" on Siegel to properly diagnose Husak. Barragan was not competent to contradict the law of this state. See Estate of Williams v. Condon, 771 So.2d 7, 8 (Fla. 2d DCA 2000)("[O]pinion testimony as to the legal interpretation of Florida law is not a proper subject of expert testimony."); Florida Power & Light v. Lively, 465 So.2d 1270, 1272 (Fla. 3d DCA 1985)(stating that whether duty exists is a question of law for the court). For these reasons, we need not reach Husak's second argument. However, if required to do so, we would also conclude Husak failed to offer sufficient competent evidence to support a charge that Siegel violated a national standard of care applicable to nurse practitioners in Florida in this case. FN4

For these reasons, we reverse the judgment below and remand with directions that Siegel's motion for judgment notwithstanding the verdict be granted.

Reversed.

<u>SUAREZ</u>, J., concurs.<u>GERSTEN</u>, Judge (concurring).

I respectfully concur with the majority's decision to reverse and remand, directing a verdict in favor of Doreen Siegel, ("Siegel"). Although the majority's analysis is on point, because this case turns on the standard of care issue, it is the only issue that needs to be addressed.

A trial court should direct a verdict in favor of a health care provider when testimony fails to show: (1) the proper standard of care; and (2) the health care provider deviated from the standard of care causing the patient's injury. See Robbins v. Newhall, 692 So.2d 947 (Fla. 3d DCA 1997). Although Florida law does not explicitly specify the standard of care for advanced registered nurse practitioners ("ARNP"), the duty for ARNPs and other health care providers should mirror a physician's duty to the

patient.

In Florida, the proper standard of care for physicians is a "duty to use ordinary skills, means, and methods that are recognized as necessary and which are customarily followed in the particular type of case according to the standard of those who are qualified by training and experience to perform similar services in the *community* or in a *similar community*." *See Sweet v. Sheehan*, 932 So.2d 365 (Fla. 2d DCA 2006)(emphasis added); *Torres v. Sullivan*, 903 So.2d 1064 (Fla. 2d DCA 2005). This standard is also known as the locality rule.

*6 Because Florida adheres to the locality rule for physicians, then the same standard should logically apply to ARNPs. Here, the patient, John Husak ("Husak"), presented a California nurse practitioner to testify on an ARNP's standard of care. The expert admitted that she was not familiar with the standard of care for Florida ARNPs and instead testified about a national standard of care.

Husak's expert inaccurately equated a national standard to Florida's locality rule. Further, the expert testimony failed to show the proper standard of care for nurses in Florida, and that Siegel deviated from the proper standard of care. Therefore, the trial court erred in refusing to grant a directed verdict in favor of Siegel.

<u>FN1.</u> <u>Fabre v. Marin</u>, 623 So.2d 1182 (Fla.1993).

FN2. A "nursing diagnosis" is defined by statute as "the observation and evaluation of physical or mental conditions, behaviors, signs and symptoms of illness, and reactions to treatment and the determination as to whether such conditions, signs, symptoms, and reactions to treatment and the determination as to whether such conditions, signs, symptoms, and reactions represent a deviation from normal." § 464.003(3)(d). Fla. Stat. (2003). "Nursing treatment" is defined in section 464.003(3)(e), Fla. Stat. (2003).

FN3. The trial court rebuffed Siegel's attempt to preclude Barragan from testifying on the basis that she was offering "surprise" testimony in violation of the principle established in *Binger v. King Pest Control*, 401 So.2d 1310 (Fla.1981) (noting that rules

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governing discovery and pretrial procedure are intended to eliminate surprise in cases where a witness is not disclosed in accordance with pretrial order). See also Office Depot, Inc. v. Miller, 584 So.2d 587 (Fla. 4th DCA 1991) (expanding Binger principle to hold that allowing the presentation of a witness's changed testimony is tantamount to permitting an undisclosed adverse witness to testify). Although conduct of this type impairs truthseeking, see Grau v. Branham, 626 So.2d 1059 (Fla. 4th DCA 1993)("[a]ll the discovery rules would be for naught if one side were able to wait until after trial started to establish key pieces of evidence"), and contributes to the diminishment of public confidence in our civil justice system, we conclude the trial judge did not abuse his discretion by not sanctioning Husak under Binger in the circumstances of this case. Binger, 401 So.2d at 1313 (stating it is within the trial court's discretion whether to permit or exclude witness testimony).

FN4. On this charge, Barragan attempted to reason-somewhat circuitously in our viewthat because California, by her reckoning, same direct supervisorv requirements as does Florida for ARNPs, and because the American Academy of Nurse Practitioners (AANP), of which both she and Siegel are members, credentials nurses and sets standards for practice, there exists a national standard. However, Barragan's syllogism fails because, as she admits, the standards of practice established by the AANP are unrelated to the specific standards for any particular state. Moreover, Barragan is incorrect in her assertion that California law concerning the supervision of ARNPs is the same as Florida's law. See Cal. Bus. & Prof.Code § 2725(b)(4)(West 2004); see also Fein v. Permanente Med. Group, 38 Cal.3d 137, 211 Cal.Rptr. 368, 695 P.2d 665 (1985)(interpreting nurse's functions of examination or diagnosis, as stated in section 2725(b)(4) not to be functions reserved to physicians).

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